Filed 6/26/12 P. v. Johnson CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WALTER JOHNSON, Defendant and Appellant.	B229632 (Los Angeles County Super. Ct. No. NA078491)

APPEAL from a judgment of the Superior Court of Los Angeles Count, Gary J. Ferrari and Tomson T. Ong, Judges. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Blythe J. Leszkay and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Walter Johnson appeals from a judgment of conviction entered after a jury trial. Defendant was convicted of second degree murder (Pen. Code,[1] § 187, subd. (a)). The jury found true the allegation defendant personally and intentionally discharged a firearm in the commission of the crime (§ 12022.53, subd. (d)).[2] The trial court sentenced defendant to a total term of 40 years to life in state prison: 15 years to life for the second degree murder conviction, plus a consecutive term of 25 years to life for the firearm use enhancement.

On appeal, defendant claims instructional error. We affirm.

FACTS

Prosecution

The instant murder occurred, as all too often, after a group of people had gathered near an apartment building, drinking and partying. An altercation ensued and an individual, Jameion Benton (Benton), died from a single gunshot wound. The shooting took place at approximately 12:10 a.m. on May 18, 2008.

The prosecution presented three percipient witnesses at trial: Kwanisha Copeland (Copeland), the mother of defendant's one-year-old son; Latrina Howard (Howard); and Charles Warren (Warren). Copeland had moved into the apartment building in Long Beach about two or three months prior to the murder, and defendant either lived with her and his son or stayed there on a regular basis.

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1 All further statutory references are to the Penal Code.

2 The jury found not to be true the allegation that the crime was committed for the benefit of a criminal street gang pursuant to section 186.22, subdivision (b)(1)(C). The People elected not to proceed on the prior convictions that were alleged in the information.

Copeland was "kicking it" a little bit with Benton without defendant's knowledge. Benton was from Louisiana and had been in the area for about three months, visiting his in-laws who lived in the building and staying with his brother or godbrother, Damion Yeargin (Yeargin), who also lived in the building.

Howard was another tenant of the apartment building. Warren lived in Los Angeles but knew many of the residents in the building. Warren was also a caregiver to one of the residents. He was 40 years old at the time of the trial and had known defendant for about 10 years.

Defendant was either an active or former member of a Long Beach street gang, the "Insane Crips." Benton was associated with another gang, the "Bloods." The Long Beach Crips were rivals with any Blood gang.

On May 17, 2008, Warren had car problems and Benton gave him a ride to the apartment building. During the afternoon and evening, people were gathering at the building with Warren and Benton. They were socializing, drinking, and smoking "weed." Warren's friend from Los Angeles came by with several young men Warren did not know. The men were associated with a Los Angeles gang and were claiming their gang and selling drugs in front of the building. Copeland thought the men were from the same gang that Warren was from, although Warren did not claim any gang affiliation. Warren did not know that his friend was associated with any gang, but he had heard that the other men were from the 87th Street gang.

During the evening, Copeland and Benton left for a while in Benton's car. When they returned, Copeland saw "a lot of guns" in Benton's car, including a handgun under the front seat and another gun in the trunk.

By late evening, there were as many as 14 or 15 people gathered in front of the apartment building, including defendant, Benton, Howard, Warren and the men from Los Angeles who had come with Warren's friend. Defendant told the men that they could not sell drugs and claim their gang in front of the building; they had to go back to their own hood to do that. The young men started to argue with defendant, and defendant said that

he had some "little homies around the corner" if they wanted to fight. Defendant told the men to calm down, and he was not going to argue with them.

Howard testified that defendant was upset when he confronted the Los Angeles gang members. The young men respected defendant and told him they were "cool." They indicated that they knew people from defendant's gang and had family members in the gang. They then went across the street.

At that point, defendant walked away. Benton left in Yeargin's car. Yeargin came outside wearing a wig and orange clothing. He told Copeland that when Benton returned with his car, he was going to go commit a robbery.

After some time passed, Benton came back with Yeargin's car, and the two went into the apartment building. Copeland saw Benton was carrying a violin case. She believed there was a gun in the case because she had seen both Benton and Yeargin with guns that evening.

At some point, Warren asked Yeargin to take the young Los Angeles gang members to the metro station so they could return to Los Angeles. Yeargin drove away with them in his car.

Copeland had overheard a telephone conversation defendant had in their apartment after he told the Los Angeles gang members to stop claiming their gang. She overheard defendant saying that he saw Yeargin get into the car with a gun and that he was going to need a "burner," i.e., a gun, because "they [were] trying to get him." Copeland initially testified that she did not remember telling police that defendant asked someone to bring him a gun and did not remember defendant doing so.

After having her recollection refreshed, Copeland admitted telling detectives that defendant had said that he needed a "biscuit," i.e., a gun. Copeland initially said that this conversation took place between defendant and one of his friends in a van out in front of the building, in response to his friend saying that "they" had guns. Again, having her recollection refreshed, Copeland admitted that the conversation she overheard was a telephone conversation inside her apartment, not outside near a van. Copeland also knew that defendant had a gun which he kept in their apartment.

While defendant was standing in front of the apartment building waiting for a ride, Warren apologized to him for the behavior of the Los Angeles gang members. Benton, who was drunk, interrupted the conversation and told defendant, "Where I come from we kill [people] like you." Benton and defendant started arguing, telling each other "I ain't no punk, you can catch my fade," meaning they were not afraid to fight. This went on for five or ten minutes. They were about 10 steps away from one another. Benton came towards defendant, "like [he] was fixing to fight." Defendant backed around to face him, and Benton backed into the street.

Howard testified that defendant pulled out a gun and shot Benton. She heard one or two shots. Benton did not have a gun. His vehicle was close by, diagonally across the street, but Benton was not close to the vehicle. After the shooting, Howard ran into the building with defendant running behind her, yelling "Don't no nobody better not tell."

Copeland's recollection of the shooting differed from Howard's. She testified that Howard was not even outside during the evening or at the time of the murder. Copeland testified that the two men were arguing; Benton moved to the curb and defendant stayed in the yard. While the two men were facing each other, defendant pulled out a gun and told Benton that he was going to make him "Crip walk." This was "a dance that the Crips do," moving their feet to spell out "Crips."

Benton did not have a gun. Defendant shot at Benton's feet three or four times. Copeland observed defendant shoot Benton. Benton turned and ran to his car. After he go to his car, he called out, "Blood, I'm hit." After the shooting, Copeland, defendant, and their child went to Copeland's grandmother's house. Soon after, they went to Fresno for several months, then to Desert Hot Springs, where defendant was arrested.

Warren gave conflicting accounts of what he saw on the day of the shooting. He was interviewed by law enforcement on June 20, 2008, and the interview was played for the jury. During the interview, Warren stated he was outside in the immediate vicinity of the incident when he heard approximately three gunshots at about midnight. He did not hear any argument or see either individual with a gun. At trial, Warren's testimony changed. He stated that he was outside during the day, but inside all night after the Los

Angeles gang members left. He did not witness the shooting or hear any gunshots. He was not a gang member and did not hear any gang talk on the night of the murder.

The police responded to the shooting at 12:10 a.m. on May 18, 2008. Benton and his car keys were on the ground next to his car, which was parked across the street from the apartment building. The doors, hood, and trunk were closed. There was a loaded 12-gauge shotgun in the trunk. Benton died from a bullet that entered the back of his right hip and exited through his abdomen. He was six feet and one inch tall and weighed 225 pounds. Benton tested positive for marijuana and had a 0.08 percent blood alcohol content reading at the time of his death. Defendant was five feet and eleven inches tall and 200 pounds at the time of the shooting.

Copeland was interviewed by law enforcement on May 18 and May 28, 2008. In the first interview she identified the father of her first child, Joshua Crump, as the shooter. She said Yeargin had a gun with him the night of the shooting. Yeargin said he was going to go "shoot some shit up." She added that everyone knew that Yeargin and Benton had guns. During the second interview, she admitted it was defendant who actually shot Benton.

Copeland was in custody when she testified at trial. After her first day of testimony, she refused to leave her cell to come to court. When she testified several days later, she indicated that she was in custody because she did not want to come to court and testify. She said that she was not truthful when she testified earlier that she did not recognize anyone in court other than defendant. She recognized defendant's nephew and his friends. She was scared and nervous and "didn't want nothing to happen to [her]." She testified that two years earlier, right after defendant went to jail, defendant's cousin told her to "change [her] story." When she first talked to the police, she did not want to tell them that she saw defendant shoot Benton. She tried to avoid going to court because she did not want to tell the jury that she saw defendant shoot Benton.

Detective Todd Johnson testified as the prosecution's gang expert.[3] He identified defendant as a self-admitted member of the Insane Crips. He identified Yeargin as an Insane Crips affiliate. He identified Benton as Westside Piru, which is a Compton/Los Angeles "Blood" gang. The Insane Crips are rivals with any Blood gang. Long Beach is an "all-Crip" city. A Blood would not be welcome in north Long Beach, but it was not uncommon for a Blood to be there, possibly to visit family or friends. It would be disrespectful for Los Angeles gang members to claim their gang in Long Beach.

Detective Johnson opined that the apartment building where the murder occurred was in an area claimed by the Insane Crips. During the evening prior to the shooting, when defendant said "Cuz, what?" to Benton, it would be disrespectful. It was the same as calling Benton a Crip, which was disrespectful since Benton was a Blood. It was also an insult for Benton to call defendant "Blood." It was a threat for a Blood to say to a Crip, "Where I come from we kill [people] like you." Detective Johnson also opined that the shooting involved a "gang issue."

Detective Johnson also explained the term "Crip walk" differently than Copeland. When the Crips first became a gang, they walked with canes, and someone labeled it, "There goes a Crip." "Crip walk" is a type of dance that Crips do. Telling someone "I'm going to make you Crip walk" would mean either, "I'm going to shoot you and make you crippled," or "I'm going to shoot you walking away and do a dance like a Crip walk."

Defense

Defendant testified in his own defense. He was 35 years old at the time of trial. He had moved into the apartment building with Copeland and their son about three months prior to the shooting. He admitted that he had been convicted of possession of cocaine for sale in 1994 and again in 2000. He joined the Long Beach Insane Crips when he was about 15 or 16 years old. He stopped associating with them when he went to

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3 Although the jury found the gang enhancement not true, the gang evidence is relevant to the issues raised in the appeal.

prison in 2000. He had to stay in the area because his family lived there and he was collecting disability to support himself and his children.

From the time he moved into the building, he had repeatedly asked people at the building not to sell drugs in front of their apartment doors but to take it outside. He made the same request in about March of 2008 to Benton, and Benton complied. After that, however, Benton would stare at defendant "crazy like."

On May 17, 2008, defendant took Copeland to work and had their son with him all day. After he picked Copeland up from work, they returned home about 5:30 or 6:00 p.m. Defendant then went to a friend's house and returned to the apartment building at about 9:30 or 10:00 p.m. When he returned, a group of people, including Copeland, Benton, and some young people defendant did not know, were hanging out in front of the apartment building. The young people were rapping, but there was no gang banging or discussion about gang banging.

Defendant went inside to check on his son and then called a friend to get a ride to a club. He went back outside to wait for his ride. He did not say anything to the young men about gang banging, and he did not hear them say anything about being in a Los Angeles gang. He did not tell them to go back to their own hood or that he had homies around the block who could take care of them.

While defendant was waiting for his ride, Warren, Benton, and some other men were in a huddle, "mad-dogging" him. Warren approached him and they talked, but not about the young men out in front. Benton was on his cell phone, talking about selling some weed; he left and returned 15 to 20 minutes later. Defendant, while talking to Warren, saw Benton walking up from the gate with a gun that was about two and a half feet long. Benton was pointing the gun at defendant and "mean mugging" (staring) at him. As Benton walked by, he said to defendant "You know how we do," or "This is how we do it." Defendant and Warren did not respond. Benton went into Yeargin's apartment. Defendant's ride pulled up and he left.

Defendant went to a club for about 45 minutes to an hour. When he returned home, the crowd had left. Warren, his girlfriend, Benton and another man and woman

were outside. When defendant approached the group, Benton looked at him and said to the other man, "I murder [people] like him," or "I murder [people] for money." Defendant knew that Benton was referring to him, and he felt threatened and afraid for his life.

Defendant went to his apartment, put his .38 caliber revolver in the back of his waistband and returned outside to talk to Benton and try and resolve whatever problem Benton had with him. He took the gun because Benton had one and had threatened him. He did not plan to shoot Benton or use the gun. When he came down the walkway from his apartment to the street, Benton said, "This [man] thinks I'm playing." Defendant then continued down the walkway and Benton left and was out of sight.

When defendant got to the front of the building, he saw Benton across the street, going toward the trunk of his car. Defendant had heard that Benton kept his gun in the trunk and thought Benton was going for his gun. Defendant told him to back away from the car. Benton had the keys in his hand, apparently trying to pop the trunk open. Defendant again told Benton to back away from the car, but Benton refused and continued trying to open the trunk. Defendant pulled out his gun and aimed across the street and down at the ground. He was not aiming for Benton. He fired two times, trying to scare Benton away from the trunk. Benton kept trying to get into his trunk. His left side was facing toward defendant. Defendant fired a third shot. After this shot, Benton turned and started to move away from the trunk. Defendant started to run and fired a fourth shot. He was not aiming to hit Benton. After the fourth shot, Benton fell and said, "I have been hit."

Defendant maintained that he was not trying to hit Benton but only shot at him because he believed that if he did not do so, Benton would get his own gun and kill him first. Defendant did not see Copeland or Howard outside at the time of the shooting. Their testimony that he shot at Benton when Benton was at or near the curb or on the same side of the street with defendant was not correct.

Defendant indicated that Copeland had told him that Benton had guns in the car, bragged about having shot people in Louisiana, and about "what he do and what he will

do to somebody." He had not heard that Copeland and Benton were flirting or having an affair. In any event, he and Copeland did not have an exclusive committed relationship, and he had another girlfriend.

After Benton was shot, defendant panicked and ran. He stayed for several days with a lady friend in Long Beach. He then went to the home of Copeland's grandmother. He did not go to Fresno with Copeland or live with her there. He was arrested in Desert Hot Spring when he went there to visit Copeland.

DISCUSSION

Trial Court's Failure to Instruct on the Principles of Reasonable (Perfect) Self-Defense and "No Retreat" Rule

Defendant contends that the trial court erred in denying his request to instruct the jury on reasonable (perfect) self-defense and the no retreat rule. We disagree.

In general, the trial court has a duty to instruct the jury sua sponte as to the principles of law relevant to the issues raised by the evidence. (*People v. Wims* (1995) 10 Cal.4th 293, 303.) This duty includes the duty to instruct on defenses where it appears the defendant is relying on those defenses or there is substantial evidence supportive of the defenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 157.)

The trial court is required to instruct the jury on a defense relied upon by the defendant only if the defense is supported by substantial evidence. (*People v. Watson* (2000) 22 Cal.4th 220, 222.) Substantial evidence is that which is reasonable, credible and of solid value. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Although all reasonable inferences must be drawn in support of the defense, the court "may not 'go beyond inference and into the realm of speculation in order to find support for [the defense]. A finding . . . which is merely the product of conjecture and surmise may not be affirmed.' [Citations.]" (*People v. Memro* (1985) 38 Cal.3d 658, 695, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn.2.)

The trial court instructed the jury on unreasonable (imperfect) self-defense in the instant case pursuant to CALJIC No. 5.17 and also instructed on any doubt as to whether the crime was murder or manslaughter pursuant to CALJIC No. 8.72. Trial counsel also requested CALJIC No. 5.50 (Self-Defense—Assailed Person Need Not Retreat). CALJIC No. 5.50 provided: "A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of [his][her] right of self-defense a person may stand [his][her] ground and defend [himself][herself] by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue [his][her] assailant until [he][she] has secured [himself][herself] from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene."

The trial court refused to give the requested instruction, stating that it applied only to self-defense rather than imperfect self-defense. Defense counsel argued that, "the jury might decide this is perfect self-defense." The court again refused the instruction, stating, "I can make a finding right now that there is no substantial evidence that the there is [*sic*] evidence that would support [*sic*].

The jury was given CALJIC No. 5.17, which provides: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter. [¶] As used in this instruction, an 'imminent' peril or danger means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [¶] However, this principle is not available, and malice aforethought is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force, attack or pursuit."

The People contend that defendant forfeited his claim for failure to instruct pursuant to CALJIC No. 5.50 because he did not object that the failure to instruct would have violated his federal constitutional rights. (See *People v. Hinton* (2006) 37 Cal.4th 839, 896-897 ["the claim is forfeited because [the] defendant did not articulate this ground below"].) In the trial court, defendant argued that substantial evidence supported a "perfect self-defense" instruction. Defendant claims, however, that where an explicit constitutional theory is advanced on appeal but was not specifically raised below, it is not forfeited on appeal where it does not "invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17, emphasis omitted; *People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

We do not believe that the federal constitutional errors raised by defendant on appeal were forfeited. Regardless, the evidence presented at trial did not warrant the requested instruction.

While it is true that a defendant's testimony alone may be sufficient to constitute substantial evidence warranting a jury instruction on self-defense, the evidence needs to be sufficient to support the instruction. (*People v. Lemus* (1988) 203 Cal.App.3d 470, 477). CALJIC No. 5.50 requires a person to be threatened with an attack. There must be substantial evidence that the defendant believed in the need to defend against imminent danger of death or bodily injury, and the belief must be reasonable. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.) Imminent danger means danger that existed or appeared to exist at the very moment that the defendant inflicted the assault. (*Id*. at pp. 1094-1095.) On appeal, a trial court's failure to give self-defense instructions will be upheld where the theory was not supported by substantial evidence. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1101, disapproved on another ground in *People v. French* (2008) 43 Cal.4th 36, 48, fn. 5; *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1269-1270).

Even looking at the evidence in the light most favorable to defendant and not considering the testimony of the percipient witnesses, there was no substantial evidence warranting the instruction requested. At the time of the murder, defendant was not threatened with an imminent attack. He went to his apartment, not being followed by the victim, and made a decision to arm himself with a firearm. He then went to seek out Benton, to resolve whatever "problem" Benton had with him.

After defendant armed himself with a weapon, he left his apartment about midnight and went down the walkway from his apartment to the street. While there were words between defendant and Benton, defendant pursued Benton. Then, according to defendant, Benton was across the street allegedly going toward the trunk of his car. Defendant could have left, but continued to pursue Benton by telling him to back away from his car. Defendant then fired two shots, trying to "scare" Benton away from the trunk of his car. Benton was not hit at that point.

According to defendant, he yelled at Benton to back away from his trunk, and defendant fired again. Possibly because Benton finally got the message that defendant was serious, Benton turned and started to move away from the trunk. Certainly at that point, even accepting defendant's testimony as true, there was no danger of imminent attack. Regardless, defendant fired a fourth shot, which, tragically, turned out to be the shot that killed Benton.

Defendant's reliance on *People v. Humphrey*, *supra*, 13 Cal.4th 1073 is misplaced, and the case is clearly distinguishable. In *Humphrey*, the defendant, a battered woman, testified that the day before she shot her husband, he hit her repeatedly, threatened to kill her, and shot at her. On the day of the shooting, the husband got drunk, swore at the defendant, started hitting her again, and walked into the kitchen. The defendant saw the gun in the living room, picked it up, pointed it at her husband and said, "'You're not going to hit me anymore,'" and, believing he "was about to pick something up to hit her with, she shot him." (*Id*. at p. 1077.) The Supreme Court held "there was substantial evidence here that [the] defendant reasonably feared imminent harm." (*Id*. at p. 1984, fn. 4.)

In the instant case, the parties were not living together, and there was no history of violence by the victim against defendant. There had been no physical violence between defendant and Benton prior to the shooting, just an exchange of words. Defendant made a conscious choice to go to his apartment, arm himself, and seek out Benton. Defendant shot at Benton three times while Benton was apparently trying to obtain a weapon from the trunk of his car. After three shots, Benton, even according to defendant's testimony, backed away from the car, and there was no threat of immediate harm when defendant fired the fatal fourth shot. The facts of this case are vastly different from those in *Humphrey*, where the victim had a history of violence against the defendant, the shooting occurred after an assault, and the defendant was in imminent fear of the assault continuing.

Moreover, any error in failing to give CALJIC No. 5.50 was not prejudicial under either *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [prosecution must prove error harmless beyond a reasonable doubt] or *People v. Watson* (1956) 46 Cal.2d 818, 836 [defendant must show reasonable probability the error affected the verdict]. Inasmuch as the jury rejected "imperfect" self-defense, it is not conceivable that the jury could have found "perfect" self-defense. The jury's determination of defendant's guilt on second degree murder necessarily included a rejection of any defense claim of self-defense, perfect or imperfect.

Trial Court's Instruction on Imperfect Self-Defense

Defendant contends that the trial court's instructional errors on imperfect self-defense violated his rights under State law and the federal Constitution. We disagree.

Defendant contends that the "instructional errors are: (1) refusal to instruct the jury on the no retreat rule on the issue of imperfect self-defense, (2) erroneously instructing that imperfect self-defense is not available 'if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force, attack or pursuit,' [CALJIC No. 5.17] and (3) refusal to give [defendant's] requested

pinpoint instruction to clarify that an *unintentional* killing in unreasonable self-defense is not murder."

Under the doctrine of imperfect self-defense, a defendant "can be convicted of no crime greater than voluntary manslaughter" if the jury finds that he "killed another person because the defendant actually but unreasonably believed he was in imminent danger of death or great bodily injury." (*In re Christian S.* (1994) 7 Cal.4th 768, 771, italics omitted.) "It requires without exception that the defendant must have had an actual belief in the need for self-defense." (*Id*. at 783, italics omitted.) In addition, the fear must be imminent. (*Ibid*.)

Defendant's first claim is that the trial court's instructions on imperfect self-defense were incomplete because the court refused to instruct on the no retreat rule as stated in CALJIC No. 5.50. Initially, the People submit that the claim is forfeited on appeal because defendant did not request an instruction on the no retreat rule as it relates to imperfect self-defense in the trial court. Regardless, we find no error.

As noted previously, defendant initiated the confrontation. He went to his apartment to arm himself and then made a conscious decision to confront the victim, firing three "warning" shots at the victim before firing the fourth and fatal shot. The no retreat rule as set forth in CALJIC No. 5.50 provides that "[a] person threatened with an attack that justifies the exercise of the right of self-defense need not retreat." Since defendant was not threatened with an attack justifying the exercise of self-defense, the no retreat rule was inapplicable.

Defendant next contends that the trial court committed error in instructing the jury that imperfect self-defense is not available if defendant created the circumstances which legally justified his adversary's use of force. He objects to the portion of CALJIC No. 5.17 which instructed the jury, "However, this principle is not available, and malice aforethought is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force, attack or pursuit."

People v. Vasquez (2006) 136 Cal.App.4th 1176, relied on by defendant, is inapposite. In *Vasquez*, there was evidence that the defendant confronted the victim with

an accusation about a rape the victim allegedly committed years earlier. Reacting to the accusation, the victim lunged at the defendant and began to choke him. In response, the defendant pulled out a gun and repeatedly shot the victim, killing him. (*Id*. at p. 1178.) The court held that imperfect self-defense was available when the victim's use of force against the defendant was unlawful, even though the defendant set in motion the chain of events that led the victim to attack the defendant. (*Id*. at pp. 1179-1180.)

In the instant case, defendant did more than just initiate the events that led to the shooting. Defendant was the initial aggressor. There is no evidence in the instant case that the victim assaulted defendant or posed a threat at the time of the shooting.

The law is clear that for either perfect or imperfect self-defense, the fear must be of imminent harm. Fear of future harm, no matter how great or likely, will not suffice. (*People v. Hardin* (2000) 85 Cal.App.4th 625, 629.) Benton posed no threat of imminent harm to defendant prior to the shooting. Defendant went to his apartment, was not followed there, and from the safety of his own apartment, made the ill-advised decision to leave with a weapon and confront Benton.

Finally, defendant contends that the trial court erred in refusing his pinpoint instruction, which stated, "A person, acting with a conscious disregard for life, who unintentionally kills a human being, but the killing occurs in unreasonable self-defense, is not guilty of murder." The jury had already been instructed that any "killing," i.e., intentional or unintentional, in unreasonable self-defense did not constitute murder. CALJIC No. 5.17 states, "A person who kills another person . . . ." The instruction included both those who kill intentionally and unintentionally. The instruction has been repeatedly approved. (See *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 ["We find no reasonable likelihood the jury found the instructions self-contradictory or understood them, as defendants assert, to foreclose application of the theory of imperfect

self-defense."].) The jury was properly instructed on imperfect self-defense pursuant to CALJIC No. 5.17.[4]

Defendant relies on the case of *People v. Blakely* (2000) 23 Cal.4th 82 at page 91, in which the court concluded "that when a defendant, acting with a conscious disregard for life, unintentionally kills in unreasonable self-defense, the killing is voluntary . . . manslaughter." He claims his requested instruction was necessary to make this principle clear. We disagree. CALJIC No. 5.17 was clear; the jury simply rejected defendant's claim of self-defense.

Defendant contends that the cumulative effect of the errors in the instant case require a reversal of the judgment. Having found no error, this claim is meritless.

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.

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[4] The jury is presumed to have followed the instructions given it. (*People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Delgado* (1993) 5 Cal.4th 312, 331.)